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# In the Supreme Court of the United States

No.

October Term, 1982

HON. WANDA P. CHOCALLO, Administrative Law Judge,

*Petitioner*

v.

RUTH PROKOP, Chair; ERSA POSTON, Vice-Chair; MERIT SYSTEMS PROTECTION BOARD; UNITED STATES OF AMERICA; JAMES CARTER, PRESIDENT; PATRICIA HARRIS, Secretary, Department of Health, Education and Welfare; ANDREW J. YOUNG, Associate Commissioner, Office of Hearings and Appeals, Social Security Administration, U. S. Dept. of Health, Education and Welfare; ROBERT L. TRACHTENBERG, Department of Health, Education and Welfare,

*Respondents*

## PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND FOR A WRIT OF CERTIORARI TO THAT COURT BEFORE JUDGMENT

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## QUESTIONS PRESENTED

1. Whether petitioner, an Administrative Law Judge appointed by the Secretary of HEW to adjudicate Social Security cases as his direct delegate, who was not charged with any offense known to law, is absolutely immune from a removal action under Section 7521 of the Administrative Procedure Act, 5 USC §7521, based on the faithful discharge of her judicial obligations according to her own understanding and conscience and in disregard of pressures and threats.

2. Whether the constructive discharge by respondents, Office of Hearings and Appeals and the Merit Systems Protection Board, of petitioner as a permanent Administrative Law Judge is void for lack of jurisdiction and authority and for violating the doctrine of absolute judicial immunity, the Administrative Procedure and Social Security Acts, Article I, Sections 8 and 9, Article II, Section 4, and the First, Fifth, Sixth, Eighth and Ninth Amendments to the Constitution of the United States.

3. Whether Section 7521 of the Administrative Procedure Act, 5 USC §7521, as well as Civil Service Commission implementing regulations 5 CFR §930.214 et seq., is repugnant to the Constitution and void inasmuch as it constitutes a pure delegation of legislative power, is constitutionally vague in violation of the Fifth Amendment and is barred by the constitutional prohibitions against bills of attainder and *ex post facto* laws.

4. Whether petitioner, who was appointed by a head of a department under Article II, Section 2, is a civil

officer who can only be removed by impeachment for and conviction of treason, bribery or other high crimes and misdemeanors pursuant to Article II, Section 4 of the Constitution of the United States.

5. Whether it was improper for the Court below to refuse to consider respondents' discrimination and motivation where the record shows and petitioner alleged respondents singled her out and retaliated because petitioner alertly and affirmatively responded to expansionist aggressions that obstructed justice and encroached on judicial independence by petitioning Congress for an investigation and the District Court, Eastern Dist. of Pa., for appropriate redress.

6. Whether Social Security Administrative Law Judges, like other judges, have the right to move forward with administrative proceedings and conduct their judicial functions free from interruption, intimidation or harassment and free from pressures, the control and coercive influences, either direct or indirect, of parties, executive, legislative and other officials and partisan interests.

7. Whether Appeals Council orders of June 9, 1977 and November 2, 1977 in the Pearl Taylor case, and HEW regulations authorizing appeals council, a non-statutory body in the Office of Hearings and Appeals, to adjudicate Social Security cases and to review the findings and final decisions issued by the Secretary after hearing, violate the Administrative Procedure and Social Security Acts and the Fifth Amendment to the Constitution and are invalid.

8. Whether the Courts below acted improperly by "filling in the blanks" to vest respondents OHA and

MSPB, who did not file an answer, with presumptive absolute immunity to shield them from liability for damages to petitioner for their failure to observe the clear limitations on their powers.

9. Whether respondent, President of the United States, who is mandated by Article II, Section 1 of the Constitution to see that the laws are faithfully executed, has a mandatory duty to have expelled from government those respondents named and other named and unnamed public officials for having breached their constitutional and statutory oath, the Code of Ethics for Government Service, 5 USC §7301, and for obstructing the due course of justice.

10. Whether the Court below acted improperly by denying summary judgment for petitioner as a matter of law and entering summary judgment for respondents.

11. Whether the district court acted improperly in dismissing petitioner's complaint as to respondents OHA and MSPB on the ground of absolute immunity and as to all respondents on the ground the complaint is vague under Rule 8, F.R.C.P.

12. Whether the Courts below, who like other departments, are bound by the Constitution, have been unfaithful to their judicial oath for failing and refusing to pass on the constitutional and legal questions raised by petitioner so as to mandate their supervision and censorship by this Court and necessitate their ultimate removal from office to protect the public and each citizen's interest in the fair and impartial administration of the Social Security and

other laws, to insure the integrity of our system of justice, and to restore confidence in our institutions and in the ability and willingness of our Courts to administer the same justice to high officials as would normally apply to other wrongdoers.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1982

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WANDA P. CHOCALLO,

*Petitioner*

v.

RUTH PROKOFF et al.,

*Respondents*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND FOR A WRIT OF CERTIORARI BEFORE JUDGMENT**

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Wanda P. Chocallo, Petitioner, petitions for a writ of certiorari to review the per curiam judgment of the United States Court of Appeals for the District of Columbia Circuit rendered on February 11, 1982 affirming in part and remanding the case for proceedings consistent therewith.

Petitioner also petitions this Court for a writ of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit to review the decision of the district court entered after remand on May 5, 1982, which was appealed by petitioner to the Circuit Court on June 1, 1982 (No. 82-1607).

## OPINIONS BELOW

The court of appeals opinion was ordered not to be printed (App. 3a). The district court's opinion is not reported (App. 13a). The district court's opinion after remand is not reported (App. 7a). The order of the Merit Systems Protection Board is reprinted in the Appendix (54a).

## JURISDICTION

The per curiam judgment of the court of appeals was entered on February 11, 1982. A timely petition for rehearing with a suggestion for rehearing en banc was denied on April 8, 1982 (App. 1a). The judgment of the district court on remand was filed May 5, 1982 and an appeal filed on June 1, 1982 (No. 82-1607). The jurisdiction of this Court is invoked under 28 USC 1254(1) and 2101(e).

## CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

The constitutional provisions, statutes and regulations involved, which are set forth in Appendix 67a, infra, are:

Constitution of the United States:

Article I, Section 8; Article I, Section 9; Article II, Section 2; Article II, Section 4; Amendment I; Amendment V; Amendment VI; Amendment VIII.

**Statutes of the United States:**

5 USC 551; 5 USC 556; 5 USC 554 (d); 5 USC 559; 5 USC 706; 5 USC 3105; 5 USC 7521; 42 USC 405 (b) (g) (h).

**Regulations:**

5 CFR 930.202 (a); 5 CFR 930.203; 5 CFR 930.214; 5 CFR 930.221; 20 CFR 404.941; 20 CFR 404.947a.

## STATEMENT OF THE CASE

This case presents for review the Circuit Court's affirmation of the denial of summary judgment for petitioner as a matter of law; entry of summary judgment for respondents without answer, affidavits and hearing; dismissal of the complaint as to Trachtenberg, Young, Prokop and Poston, without answer, on the ground of presumptive absolute immunity; remand for district court to furnish reasons for dismissal; and the District Court's dismissal of the Complaint for vagueness under F.R.C.P., Rule 8.

Petitioner filed a complaint against respondents, government officials, setting forth several causes of action. She requests reinstatment as a permanent Administrative Law Judge appointed by the Secretary of HEW and assigned to the Philadelphia field office, Office of Hearings and Appeals (OHA), Social Security Administration (SSA), U. S. Department of Health and Human Services (HHS), with back pay, accrued benefits and damages. The office formerly was known as the Bureau of Hearings and Appeals (BHA), SSA, U. S. Department of Health,

Education and Welfare (HEW). She asks a Merit Systems Protection Board (MSPB) (formerly CSC) administrative order be declared void as contrary to her statutory and constitutional rights, powers, privileges, protections and due process of law, and be expunged from her records. She seeks substantial damages for vast invasions of her statutory and constitutional civil rights by respondents for failing to observe obvious statutory and constitutional limitations on their powers. She requests Section 7521 of the Administrative Procedure Act be declared unconstitutional.

Petitioner also seeks a mandatory injunction directing the President of the United States, who has a constitutional duty to see that laws are faithfully executed, to have expelled from government respondents and other named and unnamed officials for breach of their public trust and the Cod. of Conduct for Government Employees.

The U. S. Department of Justice, Attorney General's office, by *ex parte* communication directed the United States Marshall *not* to serve the writ of summons and complaint issued by the District Court upon respondent President of the United States. This was done in violation of 28 USC §569(b) and 42 USC 1990 and without petitioner's knowledge and consent. No motion to quash was filed in behalf of the President.

Petitioner alleges respondents Trachtenberg, Director, BHA and MSPB, conspired to deprive petitioner of her office as ALJ in order to cover up obstructions of justice and in retaliation for opposing and exposing obstructions of justice and fraud in the John C. Coleman and Pearl Taylor cases and other unlawful BHA practices. She further alleges respondent, BHA, in violation of her Fourth Amendment rights, broke into her locked office, burglarized it, stole her personal property and ransacked her office in an

effort to secure incriminating evidence in a case before her, viz., claimant Pearl Taylor. BHA, in conspiracy with Community Legal Services, Inc., of Philadelphia (CLS), and in conspiracy with CSC, invaded her privacy by covertly soliciting and inducing complaints against her from lawyers and others; asking her staff to spy on her; contacting former employers to induce adverse comments; conducting secret probes and surveillances; spreading false and vicious rumors about her in furtherance of a secret removal drive. BHA also unlawfully infringed upon her decisional independence, harassed and threatened her with investigation and removal from office during the course of administrative proceedings. BHA unlawfully refused to process a promotion due petitioner by operation of law; altered and falsified payroll and leave records; issued false personnel and payroll certification documents; confiscated her salary check; refused to furnish her with competent and adequate staff; assigned cases selectively to her; singled her out for special review of her decisions for the purpose of manufacturing evidence to effectuate petitioner's removal.

Petitioner maintains she is still an Administrative Law Judge. She has not been impeached as required by Article II, Section 4 of the United States Constitution and convicted of "treason, bribery, or other high crimes and misdemeanors." She has not been removed by the Secretary under Section 7521 of the Administrative Procedure Act, 5 USC §7521. At noon on March 26, 1980, she was constructively discharged by being evicted from her office, without any warning and without official notice. She was told by BHA management to vacate by 5:00 p.m. Subsequently, the locks on the outer office doors were changed to bar petitioner's entry. No removal action was ever filed by the Secretary, the "agency" as defined by the APA,

by which petitioner is employed. An ultra vires removal action was filed by Trachtenberg, Director, BHA, without statutory authority. His reasons are set forth in his affidavit of September 27, 1977, quoted below (A. 226):

> "Based primarily on ALJ Chocallo's *action in the Taylor case, I decided to file a letter of charges against her. I* had been *dissatisfied with her conduct in the Coleman* (Mr. 'Doe') case and *generally displeased* with her *attitude.* It was, however, her conduct in barring Mrs. Taylor's attorney from further representation without due process and her defiance of the Appeals Council's Order which *finally prompted me to take this action. I considered both acts to be gross abuses of discretion and in contravention of the law and regulations."* (Emphasis supplied.)

Respondents, in their appellate brief, stated:

> "Ms. Chocallo's removal came about because she refused to recognize the lawful hierarchy within the Social Security Administration."

Former Social Security Commissioner James Cardwell, in his April 2, 1976 response to Congress concerning petitioner's February 29, 1976 request for a congressional inquiry into BHA's obstructions of justice in the John C. Coleman case and other unlawful practices, stated (A. 113):

> *"The concept of supervision without interference in the exercise of an ALJ's judgment seems to be the issue.* I would note that *both Mr. Trachtenberg and I support the need for ALJ's to accept supervision in this sense.* Beyond that, I do not think I should comment further in light of the plan for the Bureau of Hearings and Appeals to take the matter to the Civil

Service Commission." (Underscoring [italics] supplied.)

A distinction should be made *in limine* between the two agencies involved here. BHA is the "agency" whose cases are adjudicated by ALJ's. Its office manager is the Director. The Secretary of HEW is the employing "agency", within the meaning of the APA, vested with the right to hire and fire ALJ's, to whom he directly delegates his discretionary adjudicatory powers, and whom he assigns to BHA.

The uncontradicted key facts in the voluminous record (which also are alleged with particularity in the complaint) are as follows: Petitioner, Wanda P. Chocallo, was appointed by the Secretary of HEW on July 24, 1974, as a hearing examiner under Section 1631 (d) (2) of the Social Security Act due to her qualifications as a lawyer with over 25 years experience, international lecturer, former law clerk to a Chief Supreme Court Justice of the State of Pennsylvania, and a subject of *The World Who's Who of Women*. She was a scholarship and honor student who worked her way through the University of Pennsylvania and Temple University School of Law. She completed a 4 year evening law course in 2 1/2 years while working full time.

Petitioner experienced opposition to her appointment at the outset. She was the sole SSI examiner assigned to the Philadelphia SSI office, and in addition for almost a year heard all Delaware and Harrisburg SSI cases. She also was assigned 40 Baltimore cases. Petitioner was denied an established office and full complement of staff, etc. Washington, D.C., with a minimal case load, was provided a full established office with 3 hearing examiners, 4 hearing assistants and 3 secretaries. In less than 1 year, she had to move to 3 different locations.

Trachtenberg was appointed Director, BHA, in 1975 by Commissioner Cardwell to destroy the autonomy of ALJ's by fiat. He served at Cardwell's pleasure. He had no supervisory authority over ALJ's. He also acted as Chairman of Appeals Council, a non-statutory body vested authority by departmental regulations inconsistent with the Social Security Act and the APA. He appointed appeals council members and staff, who served at his pleasure. Trachtenberg immediately undertook to issue mandatory, unlawful instructions regarding every detail of an ALJ's role under the guise of "administrative management." He encouraged his administrators in charge to assume a supervisory role over ALJ's.

Petitioner, on February 29, 1976, petitioned the Secretary, Congress, the President and others to investigate the detailed and documented charges presented and to initiate appropriate remedial action and asked MSPB to investigate.

On July 1, 1977, she filed an unprecedented lawsuit against Trachtenberg, Cardwell, other Bureau officials, Stein, Bernstein et al. and Community Legal Services, Inc. of Philadelphia in the District Court, Eastern District of Pennsylvania. She sought monetary damages and to enjoin the unlawful practices that chilled the ALJ's independence.

On July 9, 1977, petitioner received a letter dated July 5, 1977 from MSPB stating Trachtenberg filed a "letter of charges" proposing her removal as a Temporary Administrative Law Judge. In June, 1979, petitioner requested MSPB issue a subpoena on the Regional Chief Administrative Law Judge, a defendant in her suit, who informed petitioner Trachtenberg filed the removal action because petitioner sued him.

Plaintiff's lawsuit gave rise to other similar actions filed by other ALJ's. Suits also were filed by claimants

who charged Trachtenberg's practices rendered the hearing process unfair and denied their rights to a fair and impartial hearing. At taxpayers' expense, special counsel Burton Berkley was hired to defend Trachtenberg in these and other suits filed against him.

By Act of Congress all SSI hearing examiners were converted to temporary ALJ's for a term expiring December 31, 1978, effective April 11, 1977, and were deemed to have been appointed under Section 3105 of the APA. Trachtenberg, as a reprisal, unlawfully refused to process petitioner's appointment for over 6 months though he had no discretion in the matter. In January 1978, by further Act of Congress, all temporary ALJ's were given permanent status.

The complaint filed by Trachtenberg contains 3 charges. *Charge I* alleges petitioner violated a lawful order of Appeals Council of June 9, 1977 in the Pearl Taylor case by holding a hearing on June 13, 1977. The order [which was not directed to petitioner and which was unauthorized and denounced by Taylor] purported to accomplish 4 ultra vires things simultaneously: (1) vacate petitioner's interlocutory order; (2) remove the case to AC for hearing; (3) remand the case to the Acting Regional Chief Administrative Law Judge and (4) order him to reassign the case to another ALJ. *Charge II* alleges petitioner failed to relinquish the Taylor case files when asked to do so. *Charge III* states petitioner demonstrated a lack of judicial temperament that caused Appeals Council to remand three cases (Coleman, Howard and Taylor) to another ALJ because of allegedly unfair hearings. The Howard and Coleman cases were heard by petitioner while she was a hearing examiner appointed under the Social Security Act. They were heard April 2, 1975 and Decem-

ber 29, 1975, respectively. All claimants were represented by CLS.

Petitioner, after a thorough study of the record and upon hearing testimony, ascertained that claimant Coleman while working was collecting supplemental security income. His CLS attorney, Linda Bernstein, thereafter began to interrupt the proceedings, to instruct claimant not to answer the judge's questions, flouted petitioner's rulings and was generally obstructive. After the hearing, Bernstein met with agency officials and attempts were made to obtain the case files from petitioner and force her out of the case. The ARCALJ threatened to have petitioner investigated and fired for refusing to discuss the Coleman case dehors the record. Petitioner reported the threats and coercive influences to Trachtenberg, who threatened her with insubordination. He ordered her to cooperate with the ARCALJ and Bernstein; that it was her duty to do so; that she misunderstood the hearing process. He also attacked her "productivity."

Bernstein flouted and ignored 3 supplementary hearing notices and subpoenas served on her and Coleman. She demanded an immediate decision. BHA assured her, even before petitioner's decision was filed, that it would be reviewed by appeals council. Petitioner, under the law, then had to develop the record from collateral sources. She discovered Coleman received SSI payments under 3 social security numbers. Bernstein knew this. Yet, she demanded increased payments for him claiming spurious exclusions. Based on the data obtained from collateral sources, petitioner ordered Coleman to repay about $3000 fraudulently obtained.

In Taylor's case (heard February 15, 1977), her CLS attorneys tried to force a change of judge without claimant's knowledge and consent. Chief CLS attorney Stein

filed a motion to disqualify petitioner. Such motions may be granted or denied by the presiding judge and are not interlocutorily reviewable. Taylor, when told of the motion by petitioner, repudiated it and her CLS representatives. She accused Stein of "misusing and abusing her" for their own "dirty work" and "ambition". She branded the motion "stoned politics." She said she did not want Stein to represent her. She wanted the hearing postponed so she could bring in her minister to get to the bottom of things. She said "black folks have been pushed around, mistreated, shoved around and done in" that CLS "makes a rag mop out of you" "they throw you from one place to another" "to confuse your mind" that "they ought to be ashamed of themselves." She said she didn't know why she had been suddenly transferred in September 1976 from the neighborhood office, which represented her and where she always went, to Stein at the main CLS office. Petitioner discussed the motion to disqualify with Taylor. Taylor asked that it be dismissed. Claimant during the hearing decided to obtain other counsel and asked for a continuance. She did not wish CLS to represent her any longer. A formal order was issued by petitioner on May 10, 1977 dismissing the motion and excluding Stein from further participation in the case. Stein, though discharged by Taylor and excluded from the case, wrote a series of *ex parte* letters to various agency officials, in which he unauthorizedly held himself out as Taylor's lawyer. He assailed petitioner's character and competency and demanded her removal from the case and from office. Taylor knew nothing about these letters. At her request, a further hearing was set for June 13, 1977. In the interim, several attempts were made by BHA to obtain the Taylor files from petitioner's staff. On June 9, 1977, an appeals council order was issued by Trachtenberg's subordinates without

Taylor's knowledge. At the hearing she denounced BHA and the order. She said they had no right to think for her and to deny her her rights. She testified CLS threatened her that if she appeared at the hearing she would go down in defeat. They admitted to her the order was part of a conspiracy to remove petitioner from office. They told her it was a battle and she would have to choose sides. She said she did not authorize nor request a change of judge and would proceed with petitioner. She stated "that's the way they rule people today" "insisting on what you have to do", that "they refused to recognize what I told them."

Taylor stated ARCALJ Gitman met with her and Stein prior to the February 15th hearing. Gitman told her petitioner denied 15 similar cases because she was anti-black, anti-poor and anti those with nervous disorders. He promised she would be paid benefits if she helped get evidence to remove petitioner. BHA subsequently broke into petitioner's locked office, burglarized her files to steal the Taylor tapes and records and removed petitioner's personal property.

## REASONS FOR GRANTING THE WRIT

### I.

This case is unprecedented. Petitioner is the first judge in the annals of American jurisprudence removed from office for refusing to submit to official pressures. Chief Justice Burger has shown interest in these very issues by appointing a committee to take affirmative measures to protect the independence of the judiciary.

Petitioner constructively lost her position without equal protection and due process. She was never removed by the Secretary nor impeached. She was never charged with any offense known to law. Nor did she violate the law or do anything to warrant such action.

Petitioner in her assigned Philadelphia BHA office environment, when deciding Social Security cases, was placed under undue pressure and intimidation by agency officials and other improper parties. She desires to be afforded the right to resume her office in BHA and to perform her duties with the protection of *Butz v. Economou,* 438 U.S. 478 (1978), as an "independent" ALJ as required by the APA "free from the control and coercive influences, either direct or indirect of the executive, legislative or politics" "free from pressures by the parties or other officials within the agency." She wishes to insure the rights of claimants coming before her to fair and impartial hearings. Other judges are being coerced. They will become subordinates and not independent decision-makers. Petitioner submits this Court should review this case because the Court below ignored the body of law developed by this Court. If the decisions of the Circuit and District Courts are permitted to stand, the criteria developed by precedents

of this Court since *Marbury v. Madison*, 1 Cranch 437 (1803) will, by default, be drained of meaning.

"One policy consideration pervades this case, the public interest requires decisions and action to enforce laws for the protection of the public and its citizens." *Schuerer v. Rhodes*, 416 U.S. 232, 40 L.Ed. 2d 90. The imperative public importance not only justifies review by this Court but a deviation from normal appellate practice so that inseparable issues may be resolved at once. This Court stated in *Butz:* "Adjudications have a serious impact on private and public rights and must be conducted by independent ALJ's as required by the APA. The due process and equal protection clause is, moreover, the only security guaranteed each citizen."

The integrity of the Court, which is one of the nation's choice traditions, cannot be maintained if an ALJ qualified to sit by all moral and ethical standards, allows herself to be driven from sitting in judgment on a case and also from office. It is, therefore, of vital national concern that the important constitutional issues raised be adjudicated by this Court.

BHA and MSPB recognized the limitations upon their power over the ALJ's decision-making process. The position description issued to ALJ's, approved by MSPB, states ALJ's possess "full and complete individual independence of action and decision . . . without review (and) full responsibility and authority for the conduct of hearings and the disposition of cases." "The Social Security and Administrative Procedure Act," the description continues, "prohibit substantive review and supervision of the (ALJ) in the performance of his quasi-judicial functions. His decisions may not be reviewed before publication, and after publication only by the appeals council in certain prescribed circumstances. He is subject only to such admin-

istrative supervision as may be required in the course of general office management." (A. 52-55) An Attorney General Opinion to the Secretary of Interior dated January 18, 1977, ruled, after consulting with MSPB, an ALJ's jurisdiction over a case ends after an appeal is filed from his decision and an ALJ cannot be disciplined for discharging adjudicatory functions according to his conscience and understanding. He noted MSPB is the agency charged with supervision of the ALJ program by Congress and "has been looked to by the courts to prevent any devious practice subersive of the proper independence of ALJ's."

This Court held in *Wong Yang Sung v. McGrath*, 339 U.S. 33, that courts cannot stand aside and rubber stamp their affirmance of decisions that are repugnant to the Constitution and inconsistent with statutory mandate or that frustrate the congressional policy underlying a statute. That is precisely what the courts below did here. They condoned and contributed to respondents' usurpation of sweeping dictorial powers, by summarily and perfunctorily stripping a judge of her office, her livelihood and reputation without examining the record and interpreting and applying the law to the actual facts of record. The APA, 5 USC 706 (2) mandates an independent assessment of a citizen's claim of violations of First, Fifth and other constitutional rights when reveiwing agency decision-making. Whether a party sues directly under the Constitution or, instead, asks a federal court to set aside the agency action as contrary to her constitutional rights under 706 (2) (B) of the APA, the role of the district court is the same. *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579; *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Porter v. Califano*, 597 F.2d 770 (5 Cir., 1979). The District Court should have predicated its crucial First, Fifth and Eighth Amendment judgment on its own assessment of the record. Instead, it wrongly deferred

to the agency determination by granting the government's summary judgment motion without answer, affidavits and hearing.

The Court below did not apply the controlling tests to this case. Avoidance was resorted to as an avenue of escape from the paramount authority of the Federal Constitution. The material mistakes of law are apparent on the face of the record. Justice David Davis said, in speaking for this Court in *Ex parte Milligan*, 4 Wall 2:

> *"No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended* during any of the great exigencies of government. *Such a doctrine leads directly to anarchy or despotism. . . .* Our fathers knew that *unlimited power was especially hazardous to freemen."* (Emphasis supplied.)

Chief Justice Burger declared in *Schuerer v. Rhodes*, supra: "Public officials, whether governors * * * or judges, who fail to make decisions when they are needed * * * do not faithfully perform the duties of their office." And in *United States v. Nixon*, 418 U.S. 683 (1974), he said: "Many decisions of the Court, however, have unequivocally reaffirmed the holding of Marbury v. Madison, 1 Cranch 137 (1803), that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" Chief Justice Marshall in *Marbury*, denominated those judges who fail to apply and interpret the law as "immoral" "worse than solemn mockery" and "equally a crime."

By statute and regulations, respondents BHA and MSPB had no right to hire, discharge or interfere in the employment of an employee such as petitioner. 5 USC 551; 3105; 7521; 5 CFR 930.202 et seq.; 42 USC 405 (1); Section 1631 (2) (d) of the SSA. These powers were entrusted

by Congress to the Secretary of HEW, the "agency" within the meaning of 5 USC 551 and 5 CFR 930.202. The power to hire and fire is non-delegable. 5 USC 559. Once the Secretary makes a valid delegation of his adjudicatory powers to an ALJ, he, himself, as the "agency" cannot divest the ALJ of jurisdiction. Jurisdiction can only be reasserted by amending the regulations containing the delegation. *United States v. Nixon*, 418 U.S. 683 (1974); *Accardi v. Shaugnessy*, 347 U.S. 260 (1954).

Petitioner's jurisdiction in the Taylor case could not be terminated by the ultra vires Appeals Council order issued at Trachtenberg's direction. MSPB and the courts are charged with a knowledge of the law. They impeached a faithful judge because, allegedly, she disobeyed a "lawful" order of Appeals Council. Yet they would not rule on the validity of the order. It was petitioner's duty to interpret and apply the law to Appeals Council's order. She made her decision with absolute disregard of anticipated personal consequences. The courts failed to faithfully execute their obligation.

Other statutory provisions as well barred respondents BHA and MSPB from doing what they did. 5 USC 7521 (1979 pocket part); 42 USC 405(h) and 18 USC 1505. The APA, SSA and 18 USC 1505 prohibited respondents from reviewing petitioner's decisions. The Social Security Act, 42 USC 405(h), forbids *"any person, agency or tribunal"*, except the district court under 405(g), from reviewing the findings and decision of the Secretary issued after hearing, which is final and binding on all parties. This Court held review of such decisions cannot be obtained under the APA, the Mandamus Act or any other vehicle. *Califano v. Sandors*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed. 2d 192 (1977). Also it is a well recognized rule that the integrity of the judicial process is best preserved by recog-

nizing that judges, as independt decision-makers, have no obligation to defend themselves in reviewing courts.

The Court below gave an ironic twist to the law. It sustained Trachtenberg's fatally defective complaint, which petitioner challenged, while dismissing petioner's detailed complaint on the ground it is vague. This is a classic case of one law for Athens and another for Rome. The threshold question of jurisdiction, moreover, was totally disregarded. The jurisdictional essentials necessary to the validity of every judgment were lacking. They are, jurisdiction of parties, jurisdiction of the subject matter and power or authority to decide the particular matters presented and the lack of either is fatal to the judgment. The fact that an indispensable party, viz., the Secretary, was lacking alone was fatal. *U. S. v. United States F. & G. Co.*, 369 U.S. 506. Under the circumstances of this case, it is clear that summary judgment should have been entered for petitioner as a matter of law. The use made of the summary judgment statute was a perversion of justice and abuse of it.

The agency action was also barred by the doctrines of constitutional statutory and common law judicial immunity which petitioner invoked *ab initio*. Petitioner's judicial acts were protected by common law judicial immunity. Judges will be subject to liability only when they acted in the clear absence of all jurisdiction. *Butz*, supra. Immunity is an affirmative defense and must be pleaded in a responsive pleading. No responsive pleadings were filed by respondents. While the district and circuit courts ignored petitioner's properly pleaded defenses of absolute judicial immunity, they assumed the role of triers of fact to confer presumptive absolute immunity upon Trachtenberg, Young, Prokop and Poston to shield them from liability. Trachtenberg and Young were ministerial officers who ignored the clear statutory limitations on their powers. Prokop and

Poston clearly were absent subject matter and party jurisdiction. What they did was expressly forbidden by law. The gratuitous vestiture of immunity upon them by the circuit court *sua sponte* cannot be sustained under *Butz*. Additionally, respondents were engaged in criminal conduct proscribed by 18 USC 1505 which barred immunity. The removal action was filed during the pendency of the Taylor case. It impeded and obstructed the due course of justice. This Court declared in *O'Shea v. Littleton*, 414 U.S. 502, 94 S.Ct. 669 (1974):

> "We have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. Cf. Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676 (1880). On the contrary, *the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress.'* "

The Circuit and District Courts' actions cannot be supported by law.

The court likewise would not rule on petitioner's claim that the agency action is void because it is barred by Article II, Sec. 4 of the Constitution. Petitioner who was appointed by the head of a department qualifies as a civil officer within the purview of Article II, Sec. 4. *U. S. v. Germaine*, 99 U.S. 483; *U. S. v. Mouat*, 124 U.S. 303; *Buckley v. Valeo*, 424 U.S. 1. Impeachment for and conviction of treason, bribery or other high crimes and misdemeanors, as provided under Article II, Sec. 4, is the only method by which petitioner could be removed from office. Any other removal of an ALJ appointed by the Secretary constitutes a bill of attainder.

The Court failed to rule on the constitutionality of Section 7521 of the APA challenged by petitioner. It was

obliged to do so. *Blair v. U.S.*, 250 U.S. 273. The statute is a pure delegation of legislative power and must be declared void. Congress failed to lay down policies and establish standards. *Wichita R. & L. Co. v. Pub. Utilities Com.*, 260 U.S. 48. It is also void for vagueness. It necessitates so much guesswork as to its coverage as to incur the condemnation of the Fifth Amendment. *Giacco v. Pennsylvania*, 382 U.S. 399; *Anti-Fascist Committee v. McGrath*, 341 U.S. 123; *Ricks v. Dist. of Columbia*, 414 F.2d 1097 (1968).

The agency action violates the prohibitions against *ex post facto laws* contained in Article I, Sec. 9 and is void. Acts punished must by law of the land be forbidden when done. *Chambers v. Florida*, 309 U.S. 227 (1940); *Cummings v. Missouri*, 71 U.S. 277.

The action is retaliatory and discriminatory as evidenced by the record. The Court failed to apply the tests required by law. Petitioner's constitutionally protected conduct was a motivating factor in Trachtenberg's decision to have her removed. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Petitioner's decisions were singled out for special review at Trachtenberg's direction. None of the almost 1000 decisions issued by her had been remanded by the district court. No adverse actions were filed against ALJ's whose decisions had been remanded by the courts and appeals council, and who failed to comply with appeals council's orders directed to them personally. It is patent petitioner was denied the equal protections of the law.

Findings

The agency action likewise is ineffective inasmuch as it failed to make express findings of fact and conclusions based upon the evidence as required by 5 USC §557(c)

and to show the ruling on each finding, conclusion, exception and omission presented by petitioner. The lack of express findings et al. cannot be supplied by implication or by reference. *Panama Refining Co. v. Ryan,* 293 U.S. 388; *Butz v. Economou,* supra. Nor is the action supported by substantial evidence.

Petitioner's request for mandamus relief against the President has been totally ignored. Those who frustrate the law undermine the Constitution and individual rights, and provide uncurbed and unprincipled leadership, must be punished and held accountable. For the responsible American citizen to remain silent is cowardice and a grievous injustice to the proposition that in America the law is supreme.

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II

The District Court on remand dismissed petitioner's complaint stating it is "vague" and does not conform to FRCP, Rule 8. The complaint facially does not lack detail. Mere vagueness or lack of detail is not a ground for a motion to dismiss. The proper method of attack is a motion for a more definite statement. *Clus v. Brooklyn Eastern Terminal,* N.Y., 359 U.S. 231, 79 S.Ct. 760 (1959); *Ybarro v. City of San Jose,* CA Cal., 503 F.2d 1041 (1974).

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III

The courts below did not deal with these serious considerations that strike at the heart of the independence of judges and their and their fellow citizens' inalienable rights. What occurred here does not lend to principled and fearless decision-making but tends to the scandal and subversion of justice.

There is not one shred of evidence in this entire record to show petitioner has been guilty of some violation of law which, if legally proved, would justify her impeachment or removal from office. And petitioner is entitled to every presumption of innocence until and unless such a violation is charged and proved in a proceeding in which she, like respondents and other judges and citizens, is accorded the protection of the safeguards guaranteed by the requirements of equal and due process of law. The respect for a rule of law administered through the equal and due process of law is the hallmark of judges without which they cannot keep faith with their profession. Taking away a woman's right to hold judicial office is imposing a penalty as severe as a criminal sanction, perhaps more so. Those in government who must carry the burden of guilt, should carry the burden of proof.

The practices disclosed by this record are forbidden by law. The exalted powers of government were used to punish manufactured crime dictatorially because petitioner pursued measures to preserve the impartiality and integrity of the administration of justice under the Social Security laws. MSPB and the courts below, bent on petitioner's defeat, employed distortions, misrepresentations and falsehoods.

The specter of improper relationship between OHA, CLS and MSPB hovers throughout this record. Trachtenberg, through his subordinates, aided CLS attorney Bernstein in suppressing and abetting fraud and frustrating the ends of justice in the Coleman case. Significantly, Bernstein openly brags she was recently appointed an ALJ because she helped Trachtenberg get rid of petitioner. Trachtenberg aided CLS attorney Stein, who was fired and condemned by Pearl Taylor in obstructing justice in the Taylor case. The courts below ignored not only the actual facts of

record but the statutorily and constitutionally defined immunities protecting petitioner's conduct. To protect the wrongdoers, they fashioned judicial phrases, known as common law absolute immunity, that do not appear anywhere in the Constitution because the framers of that document designed it to protect the citizens against tyrants in government and not vice versa.

To tolerate CLS counsel's flouting the rulings of a presiding tribunal, the judicial process would degenerate to whatever might be the personal whims of counsel on a particular day. One might as well have counsel wear the robes, ascend the bench and then make irrevocable rulings while the trial judge patiently awaits the command of counsel. The only parties to the Coleman and Taylor proceedings were claimants and the public, both of whose interests petitioner, acting in behalf of the Secretary, had a dual responsibility to safeguard. CLS, Trachtenberg as Chairman of Appeals Council, and his subordinates were not parties to those proceedings. None of them had legal authority to do what they did.

It is common knowledge that public officials, counsel and courts are bound by the law and must fastidiously observe limitations on their powers. They are required to follow congressional mandates whether explicit or ascertainable as inherent in underlying policy. This precludes them from giving effect to their own notions as to what is wise, just or politic with respect to proceedings within the jurisdiction of an ALJ. The present record reflects a pervasive pattern of evasions and violations of the law. It is unreasonable to assume respondents merely mistakenly concluded that the circumstances as conceived by them warranted the particular actions taken by them. On the contrary, they deliberately failed to observe the obvious

statutory limitations imposed upon their power and authority.

The obligation of a judge to safeguard public and private rights with equal protection under the law does not permit a timorous reluctance to take whatever action is warranted by the circumstances of a case even when such action must be directed towards high ranking officials within the same or coordinate branches of federal government. Judges must not be obsequious toadies in their attitudes toward recreant high ranking officials. Servile judges contaminate impartiality and weak characters ought not to be judges. The people depend upon courageous and independent judges for decisions and judicial conduct that will insure society as a whole and its individuals against those who would undermine and destroy the orderly and impartial course of justice. The administration of justice ought not to be made unduly difficult by irresponsible acts of public officials, lawyers and courts. To allow what occurred here to go unnoticed and uncensored would encourage and perpetuate unlimited harassment and intimidation of the most conscientious judge. It seriously disrupts, hinders and obstructs the orderly, untrammeled and impartial administration of justice and abrogates the rights and dignity of the trial judge, which must be as scrupulously guarded and maintained by the judiciary as the rights and independence of litigants and lawyers. *Ex parte Secombe*, 60 U.S. 9.

To reiterate, there is ample precedent for effective action by a judge to protect his or her independence. Chief Justice Burger's Committee on the Judicial Branch must not represent mere lip service and aggrandizement of power. In an interview by U. S. News World Report, Inc. on December 19, 1977, Chief Justice Burger pertinently commented with respect to a bill proposed by Senator Sam

Nunn for a commission to review charges of misbehavior by a judge that "it must be used with great caution and alertness *never to impinge on the decisional independence of federal judges.*" He said to subject federal judges to a suggested reconfirmation proceedings at certain intervals *"would strike at the very heart of the independence of federal judges."* Federal Judge Irving F. Kaufman aptly stated in *Maintaining Judicial Independence: A Mandate to Judges,* 66 ABAJ 470 (1980) *"while the preservation of judicial independence is a clear mandate to every judge"*, it *"can no longer be entrusted to the ad hoc initiatives of individual judges, lawyers or scholars."*

Like Lech Walesa, whose Polish heritage petitioner shares, her commitment to freedom and opposition to tyranny has never been stronger. To a Pole, wherever born, the Polish sense of freedom, honor and humor cannot be destroyed by force, money or slander. Our ancestors had to persevere through the lifetime of several generations. Petitioner unabashedly admits she is so dedicated that she fights her own battles out of the conviction that if she is going to change things then she would have to win that change in the courts. The brutal Nazi oppressor, Hitler, who declared himself the depositary of all judicial power in Germany, was taught the ages-old lesson that "though wrong may triumph for a season the gravitation of eternal justice is towards the throne of God", and any Nation which does not plumb its practices with that gravitational line must perish.

The goal of our legal system is that each party shall have his or her case, criminal and civil, adjudicated by an *impartial* tribunal. Petitioner's conduct was above reproach and warrants no apology. At the risk of her job and reputation, she administered thorough, painstaking and impartial justice to claimants and the public alike. Respon-

dents and the courts below just do not measure up to what every citizen has the right to expect from those given the special privilege of administering justice. Their interest in impartiality is pure sophistry. It is only fair that the moral in one of Aesop's famous fables, which were used for political purposes when the reign of tyrants in Greece made unveiled speech dangerous, be invoked here; viz., "The Two Crabs", which teaches: *"Example is the best precept."*

## CONCLUSION

For the reasons stated above, the petitions for certiorari and for certiorari before judgment should be granted.

Respectfully submitted,
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*Pro Se*